

Wis. Road Dispute Spotlights Tribal Title Insurance Challenges

By **Abraham Gross**

Law360 (April 14, 2023, 1:59 PM EDT) -- A complex Wisconsin federal court battle over high-profile road closures on the Lac du Flambeau Band of Lake Superior Chippewa reservation highlights the unique considerations for title insurers that issue policies for tribal lands with patchwork legal statuses and the potential for bureaucratic entanglements.

The case, which drew the involvement of the U.S. government this week, landed in court after years of unresolved disputes between the tribe and nontribal residents of the town of Lac du Flambeau over rights to use roads on the reservation that lead to the residents' houses. The matter also has involved the town, the federal Bureau of Indian Affairs and the residents' title insurance companies.

While the Lac du Flambeau Band reached a deal in March to temporarily reopen the roads, its president, John D. Johnson, said in a statement at the time that the tribe would continue to seek compensation from the town and the title insurers for "unauthorized land use and disregard of our private property."

Though the Lac du Flambeau dispute remains contested in court, experts in tribal law advise that title insurance practitioners must understand the importance of tribal land's unique legal statuses, the potential pitfalls of the federal government's involvement and the sovereignty of tribes over the use of their lands.

Bureaucracy Complicates Insurers' Due Diligence

The dispute came to a head in late January, when the Lac du Flambeau Band barricaded four roads on its northern Wisconsin reservation over a dispute with local property owners who sought to extend right-of-way agreements that, according to the tribe, expired over a decade ago.

Native American lands often operate under several legal statuses as a consequence of federal government policies that forcibly divided and distributed tribal territories, allotting parcels to individuals and leading to many properties falling out of tribal control. In a later attempt to limit exploitation, the U.S. took some Native land into trust.

This patchwork of statuses for tribal lands — whether they are owned as fee simple land by a tribe or a tribal entity, held in trust by the BIA or allotted to individuals — can make them more difficult to insure, experts say.

Title insurance protects owners of real property from defects in the title, including unknown liens,

encumbrances or claims that can impact the value or uses of real property. To assess risks, title insurers rely on access to comprehensive title records to supplement land surveys and appraisals.

While most titles are available through local county records offices, documentation for tribal lands held in trust — as in the case of the Lac du Flambeau Band's dispute — are held by the regional office of the BIA, leading to bureaucratic lags in responsiveness.

"When you have this patchwork of land, there's no easy answers on easements and right-of-ways and leases," Kris O. Beecher of Dickinson Wright PLLC told Law360. "You may have what normally may be a six-month process off-reservation turn into a three-year, four-year process to develop a road."

In the case of the Lac du Flambeau Band, the dispute traces back over a decade to a breakdown in communications following the expiration of right-of-way easements on several reservation properties with roads to the homes of town residents.

The tribe said in a statement in February that the BIA had failed to respond to numerous requests over the past 10 years to resolve the dispute and that the title insurers for the homeowners in turn had requested property information that the tribe did not receive from BIA.

"There's still a fair amount of federal control over lands and right-of-way things that tribes run up against," Melody McCoy, attorney for the Native American Rights Fund, told Law360. "My sense is that this system is very, very burdensome, understaffed and underfunded, and probably not very well-designed."

Title insurers' unfamiliarity with BIA bureaucracy and the various legal statuses of tribal land can interfere with due diligence and dissuade insurers from entering arrangements involving that type of property, said James Mann of Latham & Watkins LLP, who has worked with tribes and lessees for commercial projects.

"Title insurance companies don't have a ton of experience insuring easements and rights-of-way over tribal property," Mann told Law360. "It's just not an area of expertise that most are highly familiar with, leading to a fair amount of wariness."

Recognition of Tribes' Authority Over Land Is Key

Despite the legal nuances surrounding the status of Native land and the BIA's involvement, experts say title insurers need to conduct their coverage practices with the recognition that tribes have significant authority over their land, which is often governed by their own laws and processes.

Brian L. Pierson of Godfrey & Kahn SC, who has represented the Lac du Flambeau Band on unrelated matters, told Law360 that title insurers accustomed to operating under state law could cause entanglements when negotiating with tribes like other property owners.

"It's a lack of education and understanding," he said. "It's the assumption that the way things are done outside of Indian Country must be the way things get done inside of Indian Country."

Both the tribe and the U.S. government emphasized tribal sovereignty in filings this week urging the court to dismiss the lawsuit that the landowners — who are not tribal citizens — filed in February to reopen the roads, saying both governments and their officials are shielded by sovereign immunity from

such actions.

Mann told Law360 that practitioners have had to operate carefully and directly with tribes because their ability to deploy sovereign immunity means that a private party, such as a title insurer, that is involved in a dispute over the use of real property might not have recourse.

"Tribes, historically, are very careful about that usage, whether that's leasing the property, easements over the property or otherwise," he said, adding that "it really boils down to an individual tribe-by-tribe discussion."

In Lac du Flambeau, after U.S. District Judge William M. Conley declined the landowners' request to order the tribe to reopen the roads, the tribe reached an agreement with other local officials last month to resolve the dispute, at least temporarily.

Under that arrangement, the town of Lac du Flambeau — within the reservation — agreed to pay the tribe \$60,000 in exchange for opening the four roads for 90 days. But tribal officials promised not to abandon their efforts to protect the roads from unauthorized use, which Johnson, the tribe's president, said must include compensation for the past decade.

Tribes are particularly protective of their land rights and receiving compensation for its use — including by resorting to enforcement tools such as road blockades — because of a history of dispossession and exploitation of Native lands by the U.S. government and private actors, Beecher said.

"You have to protect every square inch, and part of what is involved is charging for the use of the roads," he said. "It speaks to the ability and the sovereignty of a tribe to protect its people and its resources."

Reforms Bolster Tribes' Sovereignty Over Title Issues

Experts say several reforms in recent years from the federal government and tribes themselves have strengthened tribal sovereignty over Native land and reduced issues for practitioners, including title insurers.

In April 2016, the BIA adopted new right-of-way regulations under Title 25 of the Code of Federal Regulations Part 169. While maintaining the long-standing requirement to obtain agency approval for easements, the new rules strengthen tribal authority first by generally agreeing to payment terms and conditions that the tribe negotiates, according to Pierson.

"Those regulations were amended against a historical background under which many rights-of-ways were granted through Indian Country with little or no compensation to the tribes, some of them perpetually, and in many cases not with any particular support from the tribe," Pierson said.

Federal legislation **passed in recent years** also has granted some tribes explicit permission to lease or sell their nontrust lands, resolving doubts created for title insurance businesses by restrictions on Native American land transfers under the Non-Intercourse Act.

Separately, tribes have taken the step of assuming direct ownership and control of title records from the BIA, according to experts, who also say that many tribes lack the resources and administrative capabilities that larger or more affluent tribes have to assume record maintenance and eliminate

bureaucratic headaches.

"In a commercial context, certainly, tribes are gaining in sophistication and are negotiating their own property rights," Mann said, noting that larger tribes enter into more commercial transactions, have more experience and often have stronger outside or internal counsel.

Still, ongoing complexities over insuring titles for tribal lands can turn insurers away, depriving tribal members and others of coverage.

"That puts us at a disadvantage as Native American people, and I'd hope there'd be more interest and involvement from insurance companies about how to improve and extend these services for Native Americans, because they need it," Beecher said.

The tribe declined to comment.

The BIA and counsel and representatives of the town and residents did not immediately respond to requests for comment.

Title insurers for the residents declined to comment or could not be reached for comment.

--Additional reporting by Caleb Symons and Crystal Owens. Editing by Aaron Pelc and Roy LeBlanc.